Armored Transport of Nevada, Inc. *and* **Reno Armored Transport Employees Association.** Case 32-CA-3751

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On June 24, 1982, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

ROGER B. HOLMES, Administrative Law Judge: Based on an unfair labor practice charge filed on July 6, 1981, by Reno Armored Transport Employees Association (the Union), the General Counsel issued on September 29, 1981, a complaint alleging violations of Section 8(a)(1), (3), and (4) of the Act by Armored Transport of Nevada, Inc. (the Respondent). At the hearing, the Respondent's name was corrected as shown to reflect a recent change in the Employer's name.

The hearing was held on February 17, 1982, in Reno, Nevada. The due date for the filing of post-hearing briefs was set for March 24, 1982.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Board's jurisdiction over the business operations of the Employer is not in issue in this proceeding. The Respondent is located in Reno, Nevada, and is engaged in providing armored transportation services for its customers. The Respondent's operations meet the Board's indirect outflow jurisdictional standard.

The status of the Charging Party as being a labor organization within the meaning of the Act also is not in dispute in this proceeding. Such status was not denied in the pleadings, and, therefore, it is found to be admitted to be true. See Section 102.20 of the Board's Rules and Regulations.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Seven persons were called to testify at the hearing in this proceeding. In alphabetical order by their last names, they are: Bob Barker, who is the alleged discriminatee; Dennis Cain, who is a guard employed by the Respondent; Duane Eugene Hill, who is a driver-messenger employed by the Respondent; James Hill, who is an employee of the Respondent; Richard R. Irvin, who is the attorney for the Respondent; Clyde Arthur Johnson, Jr., who is the vice president and manager of the Respondent, and Robert Charles Yaste, who is a security guard employed by the Respondent.

After having had the opportunity to observe all of the witnesses give their testimony, and after reviewing the transcript of the proceeding, I have decided to base the findings of fact herein upon portions of the testimony given by each one of the seven witnesses. (See, for example, *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).) In doing so, I have given consideration to whether the record reflects the basis for the witness' knowledge of the matters about which he testified. I have also considered the occupation of each witness and his identification with one of the participants in the proceeding, so as to determine whether the witness would likely have an interest in the outcome of the litigation. (In this connection, see also, *Gold Standard Enterprises, Inc., et al.*, 234 NLRB 618 (1978).) In addition, I have considered whether a witness' account is consistent with, or inconsistent with, undisputed facts and the accounts given by other witnesses. While there are some conflicts in the versions related by the witnesses at the hearing, it should not be overlooked that many of the findings of fact to be set forth herein are not in dispute, although the parties would reach different conclusions from those facts.

With the foregoing criteria in mind, I will base the findings of fact on the portions of the testimony which appear to me to be the credible, accurate, and reliable portions of the witnesses' recollections of these past events. Some of the findings also will rest upon stipulations by the parties, and some of the findings will be based on documentary evidence.

A. *The Events Prior to December 1980*

Bob Barker was hired by the Employer on or about September 14, 1970, as a courier driver. The Employer's courier division handles the movement by passenger car of nonnegotiable documents between various businesses. About 6 months after his employment began with the Respondent, Barker was transferred to the position of mechanic. Approximately 6 months after that, Barker became an armored car driver for the Employer. The armored car division handles the movement of valuables between various business locations and the bank. The armored car personnel are divided into three separate categories. The first man is the one who is in charge of the armored car. The second man usually drives the vehicle and makes the pickups of valuables, which job is referred

to as "jumping." The third man is usually a newly hired employee who serves as a guard, but there is not a third man on every trip. At the time of the hearing, the Employer had approximately 10 armored car personnel.

During the summer of 1972, Barker moved into the position of the first-man classification, which he retained until the summer of 1977 when he became the assistant manager. From that point in time until May 1980, Barker continued to serve as the assistant manager for the employer at the Reno facility. From May 1980 until January 1981, Barker worked as a leadman for the Employer.

On one occasion after Barker began working for the Employer at the Reno facility, Johnson observed that Barker had not kept the middle door of the armored car closed, as Johnson had instructed the employees to do. As a result of that mistake, Johnson gave Barker a day off from work for not following Johnson's instructions.

At the hearing, Johnson was handed various documents which he identified as being written warning notices. He testified, "These represent written warning notice to various employees of errors and acts that were committed that were not conducive with their work habits, and they were issued by various supervisors over a period of time." The earliest date on those documents was December 3, 1976, and the latest one was April 13, 1981. The interdepartmental memo dated December 3, 1976, which Johnson considered to be a written warning, had been signed by Johnson as the supervisor at that time. A similar memo dated December 16, 1976, which had been signed by Johnson, also was identified by him at the hearing. In addition, Johnson identified six documents concerning warnings to various employees, which had been signed by Bob Barker as a supervisor. These documents were dated in 1979. With regard to the warnings, Johnson testified that "employees were informed of their errors, "but he acknowledged that employees did not know at that time whether a written warning had been put into their personnel file or what action would be taken with their next infraction. Johnson explained, "That is one reason I went to the new form."

It was stipulated that, at the times material to this proceeding, there were no written guidelines maintained by the Employer governing the Company's policy concerning the imposition of discipline. At the hearing Barker explained his view with regard to disciplining employees while he was a supervisor, "It was kind of a weigh the person and the case and at your own discretion or his own discretion." Barker also said, "It was up to me and most of the time I had to get his okay on anything I was to do, you know." Barker was not positive, but he believed that an employee named Harry Boyle had been discharged without any prior warning during the period that Barker served as assistant manager.

In late 1980, Johnson attended a workshop of the Respondent's management personnel. During that workshop, Johnson was given a copy of a written warning form which was used in other offices. Johnson stated, "I immediately felt that it was a good form, a better form [than] the handwritten notes that were used in the past. I at that time requested these forms be sent." Johnson acknowledged that the new form had not been used prior to 1981 at the Employer's Reno facility.

Introduced into evidence as General Counsel's Exhibit 12 was a report dated April 22, 1980, from a polygraph examiner with regard to a polygraph test which had been administered to Barker. The document was not received to establish the accuracy of a polygraph machine or the accuracy of a polygraph examiner in interpreting the mechanical markings made during such a test, but, instead, the document shows the report that the Employer received in April 1980 regarding Barker. See *Big "G" Corporation*, 223 NLRB 1349 (1976). (Professor Benjamin Kleiumuntz has written an article entitled, "Lie Detection: admissible or inadmissible evidence" in the February 1982 edition of the "American Bar Association Journal"; see p. 120. See also "A Survey of Polygraph Evidence in Criminal Trials," pp. 162–165 in the same edition.)

B. *The Events in December 1980 and January 1981*

In December 1980, Barker was warned for failing to make a pickup of a consolidated school deposit money. Barker testified that he had not refused to make the pickup, and, instead, he said that he had been told by a lady at the school to "go on without it." Barker was not aware that he was written up for the incident until the time of the hearing.

Barker also acknowledged that he had been warned not to avoid the speed bumps at the Air National Guard portion of the Reno airport, as a result of a complaint from the colonel there. Barker denied the colonel's accusation that he had almost run over a guard, and he said that he had avoided the speed bumps to prevent breakage of rolled coin in bags in the armored car.

The first written infraction which appeared in Barker's personnel file was dated December 12, 1980.

Barker and Duane Hill were the ones who contacted Teamsters Union Local 533 in December 1980 with regard to representing the employees of the Respondent. As a result, a meeting was held on December 21, 1980, at the Teamsters hall where employees signed union cards.

Introduced into evidence as General Counsel's Exhibit 2 was a copy of a letter dated January 5, 1981, from Teamsters Union Local 533 to the Employer, whereby the Teamsters requested recognition as the majority representative of the employees at the Company and also advised that a representation petition had been filed with the Board. General Counsel's Exhibit 3 indicates that General Counsel's Exhibit 2 was delivered on January 6, 1981, to the Company by the Postal Service. There was no discussion between Barker and Johnson with regard to NLRB proceedings or the Union.

Introduced into evidence as General Counsel's Exhibit 4 was a copy of a letter dated January 9, 1981, from the Employer to the Teamsters, whereby the Employer asserted its doubt of the Teamsters majority status and suggested that an election under the Act be pursued.

General Counsel's Exhibit 5 is a copy of a representation petition in Case 32-RC-1262, which was filed on January 16, 1981, by Teamsters Local 533 which was seeking to represent the drivers and helpers employed by the Company at the Reno facility. General Counsel's Ex-

hibit 6 is a copy of a letter dated January 28, 1981, from the Regional Director for Region 32 of the Board, whereby the representation petition in Case 32-RC-1262 was dismissed because the employees being sought in the representation proceeding were guards, and Teamsters Local 533 admitted employees other than guards to membership.

Around the first part of January 1981, a notice was posted on the bulletin board at the Company that there would be a meeting of armored car personnel after the last truck came in that day. About 4:30 or 5 p.m., approximately six or seven drivers attended the meeting which was held near the timeclock at the Company. Barker assumed that the meeting was mandatory, so he did not punch out his timecard. At the meeting, Johnson informed Barker that the meeting was not mandatory, so he should go ahead and punch out his timecard. Barker testified:

> Like I said, the meeting was about—it was explained to us that we were going to get a 65-cent rate, a dollar an hour—a 65-cent an hour raise across the board, everyone would get it. And he went on to tell us that this would make us one of the highest paid branches in the system. He used another branch, I believe it was Sacramento, but I'm not positive, as an example, saying that we would be making more than them. And at this time he went on to explain that the fellows in San Francisco had tried to organize for the union and Mr. Irvin, the owner of the company, had closed the office at that time and waited a couple of months and then reopened using non-union help.
>
> He said that he was fearful that if Reno was to go union or anything like that that Mr. Irvin might also close it. Of course him being the vice president in the area and no armored cars in Las Vegas, he might have to move to Las Vegas and assume the operation of that down there and the rest of us would just be out of luck.

Pursuant to the request made by the counsel for the General Counsel, I have taken judicial notice of the Board's decision in *Armored Transport, Inc.*, 252 NLRB 447 (1980), where the employer therein was found to have shut down its San Francisco facility from October 10–16, 1979, and temporarily laid off its employees in violation of Section 8(a)(1) and (3) of the Act. At the time of the hearing in this case, the Board's Order was on appeal in the United States Court of Appeals for the Ninth Circuit.

The parties in this case stipulated that the wage increases given by the Respondent to its employees in May 1977, May 1978, February 1979, January 1980, and January 1981 were lawful.

On the day following the January 1981 meeting with employees, which has been referred to above, Barker was called into Johnson's office. Present were Barker, Johnson, and Betty Jean Fernandes, who is the assistant manager at the Employer's Reno office. Barker testified:

> He called me in the office to tell me that I was no longer a leadman as there was no longer any need for that position, that he would be splitting those duties up between the first men, just giving them the keys that I had carried up until that time. They would fill in on holidays on a random basis and that I would not be getting the 65-cent-an-hour raise, that my pay would just go down to what he had raised the other first men up to. So I was assuming the position going from leadman down to a first man at that pay scale.

Barker, however, did not receive a lesser hourly rate of pay than he had been earning. As a leadman, Barker was earning $6.60 an hour, which included about 25 or 30 cents an hour premium pay for being a leadman. Thus, after he was changed from leadman to first man, his wage rate actually increased to $7 per hour because of the wage increase given to the drivers. From January 1981 until his termination in April 1981, Barker continued to work for the Employer in the first-man classification.

Johnson explained at the hearing that the leadman's position had been created primarily for the field training of new personnel during the years 1978, 1979, and 1980 when the Employer's Reno operation was expanding with additional personnel and armored cars. Johnson's selection of a person for the leadman's position was based on the person who Johnson deemed to be the most qualified in his knowledge of the operation of the business. Barker was the last person to occupy the leadman's position at Reno.

After the filing of the unfair labor practice charge in this case and prior to the issuance of the General Counsel's complaint, the attorney for the Respondent submitted a statement of position letter to Region 32 of the Board. A copy of the attorney's letter dated August 26, 1981, was received into evidence as General Counsel's Exhibit 10. (See *Steve Aloi Ford, Inc.*, 179 NLRB 229 (1969).) In part the document states:

> Concerning the alleged "new written warning" procedure, please be advised that written warnings have been a part of Company policy for many years, however, as previously advised local managers have always been afforded individual discretion in these matters. Mr. Johnson was advised by Armored Transport's Northern District manager, who is located in San Francisco, as of January 1981 that he *was* to issue written warnings when he was dissatisfied with employee job performance. It was on the advice of the undersigned that some of Mr. Johnson's discretion was removed. The reason being that once emloyees start engaging in concerted activities, past experience has established that a written warning is the only practical means of enforcing Company rules because without same the Company is hard pressed to establish terminations for cause when the inevitable charge of termination for concerted or union activities comes to the fore.

During the hearing Johnson was confronted with the Respondent's earlier statement of position. As indicated above, the letter asserts "that written warnings have

been a part of Company policy for many years." Johnson's testimony is consistent with that assertion. According to Johnson, he had issued written warnings to employees since 1976. Johnson was asked at the hearing whether he received instructions in January 1981 "to start" issuing written warnings. Johnson made it clear that he had been issuing written warnings prior to that time, and that he did not receive instructions in January 1981 "to start" doing so.

Johnson also testified:

> Written warnings was something that I had been doing for years and had been done by supervision for years. The only thing changed was the form itself, which we went to a better form, I felt, that protected the employee. It gave him a chance for rebuttal which the previous type of form we used never did have.

Johnson said that he had the discretion to impose an oral warning or a written warning as a disciplinary measure based on "the nature of the offense that was committed and how it was committed, too." When Johnson was asked whether the Company's unwritten policy regarding discipline left him "with a considerable amount of discretion," Johnson replied, "Not really, sir. Our policy is based upon actions that we take in our other offices, which are union offices. So our policies of termination, of discipline follow very closely guidelines of the other offices. I'm monitored for that." When Johnson was asked if the Company's guidelines up to December 1980 "really left little room for discretion," Johnson agreed that was true. Johnson stated that he had "a certain amount of discretion on how I carried out these duties." Note that the statement of position asserts that "local managers have always been afforded individual discretion in these matters," and later in the letter, "some of Mr. Johnson's discretion was removed."

C. *The Events on March 18 and 20, 1981*

Introduced into evidence as Respondent's Exhibit 1 was a copy of a written warning for carelessness, which was given to Barker on March 20, 1981, with regard to Barker's actions on March 18, 1981.

According to Barker, he picked up the bag at the bank and took it to the Respondent's facility where the bag was signed for by guard James Hill. In Barker's view, his "responsibility to that bag ended" at that point.

Respondent's Exhibit 1 indicates under "action to be taken" heading: "Warned to watch work more carefully! Empty bag was picked up and checked in, in place of full bag."

According to Johnson, no other armored car driver at Reno has committed the same infraction. He stated, "Not the exact infraction. We have had drivers who have missorted items within our own premises. I have not written them up. They have come forward, they have admitted it and it has been under alarm and key in the protection of our company." Johnson also stated, "To my knowledge it is the first time that this kind of incident had occurred involving Mr. Barker, yes."

D. *The Events on March 23 and April 9, 1981*

Barker and Duane Hill took part in forming the Charging Party in March 1981. At some later point during the time he was employed by the Respondent, Barker became the president of the Charging Party.

Introduced into evidence as General Counsel's Exhibit 7 was a copy of the representation petition in Case 32-RC-1330, which was filed on March 23, 1981, by the Charging Party. The petition sought an election among the drivers and helpers employed at the Employer's Reno facility.

Introduced into evidence as General Counsel's Exhibits 8(a) and (b) were copies of the transcript of the representation hearing and the exhibits introduced at that hearing in Case 32-RC-1330. The representation hearing was held on April 9, 1981. Barker, Duane Hill, and Johnson were among those who attended that hearing. Barker was the only person who testified. (See pp. 7-12 of G.C. Exh. 8(a).) The transcript of the representation hearing indicates that Barker testified that the Charging Party had held just one informal meeting; that approximately 10 out of 12 of the Respondent's messenger-guards were members of the Charging Party at that time, and that Barker was not an officer of the Charging Party. (See pp. 8-10 of G.C. Exh. 8(a).)

E. *The Events on April 10 and 13, 1981*

Introduced into evidence as Respondent's Exhibit 2 was a copy of a written warning for carelessness and disobedience, which was given to Barker on April 13, 1981, with regard to Barker's actions on April 10, 1981.

In his own remarks on the warning form, Barker stated that he "filled out sheet ahead of time declaring truck empty. Forgot to sign sheet." Under the "action to be taken" heading on the form, it is stated: "Employee stated no animosity was intended on his part. I reminded him that the truck is declared empty after it *is* empty, and if normal sign in process had [been] followed, this sort of problem would not [have] occurred."

At the hearing, Johnson explained the reason for his requirement of signing the form:

> Affixing the signature affixes responsibility. This is not a case of trying to hang somebody. It is a case of each employee taking up their responsibility. It is the responsibility of the first man to sign that sheet so that we don't have, again I say, one employee thinking the other one did it and neither one did.

The system involved here had been out of effect for about 6 years, but it was reinstated by the Employer about a month prior to this incident.

Barker acknowledged at the hearing that, at the time he had written "truck is empty" on the sheet, the truck was, in fact, not empty.

F. *The Events on April 15, 1981*

Introduced into evidence as General Counsel's Exhibit 9 was a copy of the Decision and Direction of Election in Case 32-RC-1330, which was issued on April 15, 1981, by the Regional Director for Region 32 of the

Board. The Regional Director resolved the sole issue in the representation proceeding and found that the petitioner in that case, which is the Charging Party herein, was a labor organization within the meaning of the Act.

A representation election was directed to be held in the following unit: "All full-time messenger-guards employed by the Employer at its 910 West Sixth Street, Reno, Nevada, facility; excluding office clerical employees, mechanics, couriers, vault personnel, and supervisors as defined in the Act."

G. *The Events on April 20 and 21, 1981*

Introduced into evidence as Respondent's Exhibit 3 was a copy of a written warning for falsifying records, which was given to Barker on April 21, 1981, with regard to Barker's actions on April 20, 1981.

The warning resulted from the discovery that $25 in rolls of pennies in a box was found under the jumpseat of the armored car in which Barker and James Hill had been working on April 20, 1981; the keys were found inside the Company's vault which, under the Company's procedures, indicated that the coins are still in the armored car; and Barker's statement that he was not "jumping" when, in fact, Barker was "jumping" that day.

During the cross-examination of Barker by the attorney for the Respondent, Barker was confronted with Barker's handwritten comments which appeared under the "employee's remarks" section of Respondent's Exhibit 3. In part, Barker had written on the form, "I was not jumping." At the hearing Barker acknowledged that his earlier written statement was not true. Barker explained, "Apparently at this time I must have been mistaken when I wrote that, but I definitely on that day was jumping. I definitely was. It was my mistake."

However, after discovery of the box of coins, Barker had told Johnson that Barker was not jumping that day. As a result, Johnson confronted James Hill who had been working with Barker that day. James Hill prepared a written statement which stated: "On the date specified the GEMCO coin was left on the truck, I did not jump and to my knowledge I did not hang the keys in the vault. To the best of my knowledge, the truck was cleared the day in question."

According to James Hill, it was not his practice to check the armored car at the end of the day to determine if any items were left on the truck because that was the responsibility of the first man. Hill also said that it was not customary for Barker to check to make certain that Hill had hung up the keys properly, although Hill said that Barker did ask him each day if Hill had hung up the keys. According to Hill, he hung the keys up outside the vault that day, and he recalled that he and Barker left the vault area together.

Also, as a result of Barker's informing Johnson that he had not been jumping on the day in question, Johnson examined the receipt for the pickup deposit that day and discovered that Barker's signature was on the receipt. Therefore, Johnson formed the opinion at that time that it was Barker, rather than Hill, who had been jumping that day.

It was made clear at the hearing that the $25 in coins was not accessible to Barker after he had left the Employer's facility that day, and the coins would not have been accessible to him until he returned to work the following day.

According to Dennis Cain, who is a guard employed by the Respondent, a minimum number of bags of coin which may be left in an armored car is at least 10 bags. He said, "The truck has to be cleared unless you have over ten bags of coin." Cain recalled an incident in early April 1981 when about 15 bags of coin were left in the armored car, but Clyde Texiera, who was the first man, did not initial the "holdover sheet" so as to indicate that those bags of coins were in the armored car. The bags of coins were not supposed to be delivered to the customer until the following day. Cain said that he did not receive a reprimand for not signing the holdover sheet, and he pointed out that it was not his responsibility to do so. It is not clear whether Texiera received a reprimand.

H. *The Events on April 29, 1981*

Johnson viewed Barker's statement that he was not jumping on April 20, 1981, when the incident described in section 9 herein occurred, as being a serious matter. Johnson testified at the hearing, "When you accuse another employee of a wrong-doing and don't own up [to] the error or whatever or the coverup yourself, I believe that is most serious. I believe no employee has the right to unjustly implicate another employee without disciplinary action."

Under the "action to be taken" heading on Respondent's Exhibit 3, it is stated: "Bob Barker terminated 4/29/81 for actions detrimental to [the] operation. Failure to follow company rules, falsifying records and falsely implicating a fellow employee in an effort to cover errors made by himself."

At the hearing, Johnson revealed his concern with what he had viewed to be "the pattern that had taken place in the last three." incidents involving Barker. Johnson related an earlier event involving an employee in the Los Angeles office where Johnson had worked previously. He explained, "I had seen this pattern happen before in Los Angeles where I was directly involved with an employee who, unfortunately, was a good friend of mine at one time. The same pattern result and all of a sudden a testing of the system." However, Johnson was uncertain at that time whether he could legally discharge Barker because of Barker's position in the employee association. Johnson stated, "It was my belief that he was in a position of importance, president of the employee association." With regard to terminating Barker, Johnson said, "I felt in my mind it was warranted, but, not being an attorney, I seeked advice in this matter."

Shortly after the termination of Barker, Cain had a conversation with Darryl Howecraft, who is the Respondent's supervisor of armored car personnel. Cain testified, "I asked him if it had anything to do with the union, and he says I think so, but I don't really know because he wasn't the one that fired him. So all's he does was guessing, speculating."

I. *The Events on May 4, 8, and 14, 1981*

Introduced into evidence as General Counsel's Exhibits 14(a), (b), and (c) were copies of written warnings issued to security guard Yaste on May 4, 8, and 14, 1981. With regard to each one of Yaste's three warnings, the documents indicate that the nature of the violation was carelessness.

In the first instance, Yaste apparently did not notice that a key had been left in the lock on a deposit bag which was being transported from a casino to a bank. Before the bank would accept the deposit bag, the amount of money had to be verified with the casino.

With regard to the second warning, Yaste incorrectly had signed as receiving two deposit bags from a customer when, in fact, only one bag was received.

With regard to Yaste's third warning, a deposit bag from a casino was signed for by Yaste, but the bank discovered that the deposit bag was unsealed. After receiving his third warning, Yaste was given 1 day off from work without pay. The third warning also stated that Yaste was told "if this action continues, he is in jeopardy of losing his job."

J. *The Events Pertaining to Duane Hill*

Duane Hill recalled two incidents, which had occurred during the period of time between March and June 1981, where deliveries of deposits were forgotten to be made. Hill was involved in both incidents.

In these situations, the Respondent's office called the armored car on the radio and asked the employees where certain items were. The employees looked and found the deposits, and they reported that fact to the office. That night the items were taken to the Company's vault and signed in there. Hill stated at the hearing that both the office and the employees in the armored car knew where the items were after they were located, and that the property was reported, recorded, and properly documented. Hill said that the items were delivered the following day in accordance with the instructions from the Respondent's office. Hill was not given any reprimand or written warning regarding these incidents.

K. *The Events on May 22 and June 2, 1981*

It was stipulated at the hearing that the representation election in Case 32-RC-1330 took place on May 22, 1981, and that the tally of ballots reflected that eight votes were cast in favor of the Charging Party, and two votes were casts against representation by the Charging Party. There were no challenged ballots.

On June 2, 1981, the Regional Director for Region 32 issued a Certification of Representative to the Charging Party.

L. *The Unemployment Compensation Proceeding*

Introduced into evidence as Respondent's Exhibits 14(a), (b), and (c) were copies of documents which related to the unemployment compensation claim filed by Barker following his termination by the Employer.

The initial determination on May 22, 1981, by the Unemployment Insurance Service of the Employment Security Department of the State of Nevada was to deny unemployment compensation benefits to Barker because "it was determined you were discharged for misconduct in connection with the work." (See Resp. Exh. 4(a).)

On May 27, 1981, Barker filed an appeal from the initial determination to the Office of Appeals referee. (See Resp. Exh. 4(b).) A notice of hearing was issued on June 22, 1981, for a hearing before the Office of Appeals referee on July 6, 1981. (See Resp. Exh. 4(c).) The appeals referee issued his decision on July 8, 1981, and found "no basis to disturb the determination appealed from." (See Resp. Exh. 4(c) for his full opinion.)

M. *Subsequent Events*

Introduced into evidence as General Counsel's Exhibit 13 was a document which had been prepared recently prior to the hearing by Johnson. It was given to the attorney for the Respondent on the day before the hearing. According to Johnson, he had been asked by the attorney who the officers were of the organization at that time. The document states:

> (1) Skip Hill union officer at First hearing. No action taken against him good employee.
>
> (2) Martin Clune Press of Union good employee so good offered Las Vegas Armored operation—also other employee Paul George offer—only two asked to go.
>
> (3) Clyde Texiera union officer promoted to 1st man in place of Bob Barker when he was terminated. (Sec—Tres)?

Conclusions

In an earlier case before me, I received into evidence an unemployment compensation decision rendered by an agency of the State of Colorado. See *Boulder Excavating Company*, 260 NLRB 1283 (1982), and the cases cited at 1288. The Board has pointed out recently in another case before another administrative law judge that it would not be proper to exclude such unemployment compensation decisions. *Leshner Corporation*, 260 NLRB 157 (1982). However, as I indicated in *Boulder Excavating* at 1288, such an unemployment compensation decision would not be controlling in an unfair labor practice complaint proceeding before the Board, and an independent consideration and evaluation of the evidence is necessary. Thus, while I have considered the unemployment compensation decisions in which Barker's claim was denied, as described in herein, the conclusions reached in this decision with regard to the termination of Barker have not been controlled by those earlier state agency decisions.

Without repeating here all of the findings of fact previously set forth, I conclude that the number of employees in the unit at the Employer's Reno facility was relatively small at the times material herein. As noted in the findings of fact, Barker took part in union organizational activities first on behalf of Teamsters Local 533, and then later on behalf of the Charging Party. The armored car personnel at the Reno facility were described by Johnson as being "a pretty close-knit group" and "one big happy family." Counsel for the General Counsel urges, "The question of Respondent's knowledge of

Barker's particular role in union organizing must be determined from all the surrounding circumstances, particularly in conjunction with Respondent's small, closeknit staff of armored car drivers." Counsel for the General Counsel also points to the timing of certain actions by the Respondent. (See fn. 12 on p. 15 of the post-hearing brief filed on behalf of the General Counsel for a fuller expression of his argument.)

In its decision in *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959), the Board considered certain points where it was appropriate in that case to draw an inference of company knowledge of the alleged discriminatee's union activities. In summary, the Board considered: (1) the small number of employees at the plant (approximately 13); (2) the fact that the alleged discriminatee spoke out in favor of the union to other employees during his last week of employment; (3) the Company's knowledge that the alleged discriminatee previously had been a union member at his prior place of employment; (4) the timing of the termination which took place immediately after union activity became apparent; (5) the fact that the only two men who were active on behalf of the union were discharged simultaneously; and (6) the abrupt nature of the terminations without prior warning such as had been given to other employees in the past.

In *Hadley Manufacturing Corporation*, 108 NLRB 1641, 1650 (1954), the Board held:

> However, the mere fact that Respondent's plant is of a small size, does not permit a finding that Respondent had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, Respondent must have noticed them.

With the foregoing Board cases in mind, I conclude that the evidence here does not warrant the drawing of an inference of company knowledge of Barker's union activities prior to April 9, 1981, which was the date of the representation hearing. As of April 9, 1981, there is direct evidence that the Respondent knew by his attendance and his testimony at the representation hearing of Barker's participation in activities on behalf of the Charging Party. Of course, Barker's giving testimony on that date in the representation proceeding underlies the General Counsel's 8(a)(4) allegations pertaining to the Respondent's actions towards Barker. However, prior to April 9, 1981, I conclude that the points summarized above from *Wiese Plow* are not present here, except for the small number of employees, and as described in *Hadley Manufacturing*, the evidence here does not establish that Barker's union activities were carried out in such a manner or at such times that the Respondent must have noticed them. See also *K & E Upholstery Co., Inc.*, 247 NLRB 674 (1980). Accordingly, I conclude that the Respondent's actions prior to April 9, 1981, with regard to Barker, were taken before the evidence establishes that the Company had knowledge of Barker's union activities. That conclusion would apply to the warnings which Barker received prior to April 9, 1981, and the change in Barker's status in January 1981 from leadman to first man.

Having reached the foregoing conclusion with regard to the Company's knowledge of Barker's union activities, it follows that the Respondent had issued written warnings regarding Barker's actions both before and after the Respondent acquired knowledge of Barker's union activities, as well as both before and after Barker testified at the representation hearing. It will be recalled that written warnings were noted in Barker's personnel file in December 1980, and that a written warning on the employer's form was issued to Barker on March 20, 1981. Those actions, of course, took place prior to April 9, 1981. With regard to the latter warning, the counsel for the General Counsel urges in his post-hearing brief, "While the complaint was not amended at hearing to specifically charge that the March 18 warning violated Section 8(a)(3), the issue was fully litigated and the Administrative Law Judge is empowered in these circumstances to make the appropriate finding." (See fn. 9 on p. 13 of the General Counsel's post-hearing brief.)

The General Counsel also seeks a broader finding that the Respondent "enforced" a policy of issuing written warnings because of the union activities of its employees. In footnote 2, page 1, of the counsel for the General Counsel's post-hearing brief, the General Counsel urges, "The complaint herein alleges that the warning system was 'promulgated' in March 1981 (G.C. Exh. 1(c) par. 6). However, General Counsel's evidence reflects that the promulgation took place in January 1981, outside the statutory limitation period of Section 10(b) of the Act. As a result the enforcement within the 10(b) period, rather than the promulgation, is, as the evidence will show, unlawful." At footnote 7, page 12, of the General Counsel's post-hearing brief, he further urges, "As noted *supra*, fn. 2, the General Counsel is not seeking a finding that the promulgation of the warning system was unlawful since such promulgation fell outside of the 10(b) period. However, such promulgation can be relied upon as evidence of unlawful enforcement of the warning system within the 10(b) period." In urging that the Respondent's enforcement of its warning system has been unlawful, the General Counsel is alleging broadly that all of the written warnings issued within the 10(b) period to employees, including those issued to Barker, were discriminatory. As noted in herein, the Respondent acquired knowledge on January 6, 1981, that the Teamsters Union Local 533 was demanding recognition as the collective-bargaining representative of the Respondent's Reno armored car drivers.

One of the several cases cited by the General Counsel in support of his contention is the Board's decision in *Baptist Memorial Hospital*, 225 NLRB 525 (1976). However, there are some distinguishing facts between the situation presented in that case and the situation presented here. For example, the written warnings in the hospital case came "in a flood" to some employees. Administrative Law Judge Thomas A. Ricci stated at 527:

> The point which I think is pervasive in the case is well illustrated by one or two incidents. At the start of the union campaign, back in 1974, high

> management announced to its supervisory staff that henceforth there must be comprehensive documentation of every jot and title of reprimand talk and fault finding of employees that might take place. The instruction was repeated at a number of staff meetings in the spring of 1975 by the Respondent's expert labor relations counsel. The printed forms used for this purpose are entitled "Counseling Interview Records"; some, but only very few, had been used in the past. With advent of the Union, they came, as to some employees anyway, in a flood. It took some effort to draw the unequivocal admission, but the supervisors finally did say that these are straight reprimand notices, placed in the personnel files of the employees all the time, for use in possible discipline or discharge. And, of course, they have an intimidating effect upon the employee who is made to know such things are placed in his or her file.

Note also that other unfair labor practices were committed contemporaneously in connection with the issuance of the written warnings in the *Baptist Memorial Hospital* case. Administrative Law Judge Ricci stated at 255 NLRB at 528:

> However indirectly the supervisors may have put it, they were interrogating her concerning her union sympathies, inviting her to present her grievances individually to them, offering to satisfy her demands to dissuade her from her resolve, and even threatening to get her out of the hospital if she did not quit. The barrage of recorded reprimands, coupled with this kind of "counseling interview" talk—a pure euphemism—makes the intended and inevitable coercion clear. By this conduct of Courtney and Robinson the Respondent violated Section 8(a)(1) of the Act. See *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973). I also find that by placing the June 5, 1974, reprimand in Maclin's file, the Respondent violated Section 8(a)(3).

In another case cited by the General Counsel, *Electri-Flex Company*, 228 NLRB 847 (1977), there was evidence of retaliation in the employer's institution of its warning notice system. The Board held at 848:

> The fact that the Administrative Law Judge found certain uses of the warning notices to be illegally motivated supports a finding that the system was instituted with the same illegal motivation in violation of Section 8(a)(3) of the Act. Prior to the institution of the system and before the employees' selection of the Union as their exclusive bargaining representative in an election, Respondent made threats to numerous employees concerning its intentions if the Union won the election. Thus, it warned that the Company could make it "rough" on union sympathizers and that employees could be "hurt" and "things would be different" if the Union came in. Almost immediately after the election, in which the employees overwhelmingly voted in the Union, Respondent initiated its written warning notice-discipline system. It did not inform employees, however, that they would be "uniformly" subject to this system.

In *Joshua's, Inc. d/b/a Fitzwilly's*, 253 NLRB 588 (1980), which is another case cited by the General Counsel, there was evidence of antiunion motivation. The Board held, in part, in fn. 2:

> . . . the General Counsel has made a showing that antiunion considerations were motivating factors in Respondent's operation of its written warning system; its issuance of warnings under that system to employees Rooke and Alper; its denial of wage increases to Rooke and Alper; and its discharge of Alper. We further find and conclude that Respondent has failed to demonstrate that it would have taken the same actions even in the absence of its opposition to the Union.

In still another case cited by the General Counsel, *Kern's Bakeries, Inc.*, 228 NLRB 1462 (1977), Administrative Law Judge Elbert D. Gadsden described a different set of circumstances than are present here. He held at 1473:

> While the work performance record of Roger Bryant, standing alone, appears to establish sufficient evidence of cause for his discharge, when it is examined in conjunction with all of the evidence of record, particularly the evidence of Respondent's newly implemented warning system, it becomes obvious that such contended cause was not the real reason for his discharge. More specifically, when it is observed that Bryant had worked for Respondent for 2 years prior to his discharges on October 22, 1975, and February 12 or 21, 1976, the record does not show Respondent had any significant problem with Bryant's performance prior thereto; that his first discharge occurred during the advent of the employees' union activity, and his second discharge occurred immediately subsequent to Respondent's institution of the warning system, after it learned about the union activity of Bryant, Bradley, and other employees; that Bryant has been the only employee to have fallen victim to Respondent's new warning system and the only employee who was the subject of a customer's written complaint; that one of Respondent's customer witnesses' testimony was not credible; that Respondent made a diligent effort in Bryant's case too, to collect evidence against him to justify the use of several written warnings, with the long-range object to obtain a sufficient number of warnings to make its discharge of him appear for just cause; that Bryant was the first driver employee in the Louisville area to have been followed on his route by a supervisor; and that all of these incidents occurred within a period of 4 months, beginning October 22, 1975, 3 days prior to Respondent's receipt of the Union's demand letter on October 25, 1975.

In *McGraw-Edison Company*, 216 NLRB 460 (1975), which is another case cited by the General Counsel, the employer therein read to its supervisors the union's letter about the union organizing campaign and the names of the members on the union's organizing committee, and ordered its supervisors to issue written reprimands "Whenever necessary," and also "suggested that thereby the supervisors could get rid of them as they weren't too smart." (216 NLRB at 468–469.)

In the instant case, the evidence revealed that the Employer had been issuing written warnings to its employees for many years prior to the Union's organizing activities at the Reno facility. As far back as 1976, the Employer had utilized a system of written warnings in employees' personnel files. Beginning in January 1981, a different form was used which had space for an employee's remarks, and a copy of the warning was given to the employee involved. In the sense of an employee's having the opportunity to state in writing his view of the infraction, and being informed in writing rather than verbally, Johnson viewed the newly adopted form at Reno to be a "benefit" to the employees, rather than a detriment. However, the fact remains that, both before and after the union organizational activity, the Employer had issued written warnings regarding its employees' actions, even though the form and the method of communication were different.

General Counsel's Exhibit 10 disclosed that some of Johnson's discretion was removed as to whether a written warning would be issued. However, General Counsel's Exhibit 10 does not suggest that warnings be given without justification; as a means to get rid of union supporters, or as retaliation against employees for engaging in union activities. See the situations described in *McGraw-Edison, Kern's Bakeries, Fitzwilly's,* and *Electri-Flex, supra.* Instead, General Counsel's Exhibit 10 indicates that Johnson was to memorialize in written warning form the Company's enforcement of the Company's rules for use in the event of a subsequent charge of discrimination. (See sec. B, herein, for the full text of the portion of the statement of position in question here.) However, the exhibit does not suggest disparate or discriminatory enforcement of the Company's policy, but instead that Johnson should issue written warnings "when he was dissatisfied with employee job performance." I conclude that discriminatory enforcement has not been shown.

As shown in sections G and H, herein, it was what happened concerning Barker's last warning which Johnson viewed to be "most serious" pertaining to Barker. In Johnson's view, it was not simply the incident which occurred on April 20, 1981, involving leaving the box of coins in the armored car, but instead, it was Barker's verbal statement to Johnson and Barker's written statement on the warning that Barker was not jumping on the day in question. Thus, Johnson concluded that Barker was attempting to implicate James Hill as the person who had made the error, when, in fact, Barker knew that James Hill had not been jumping that day. Thus, Johnson expressed his view on the written warning that Barker was attempting to cover up his own error by shifting the blame to his partner on the armored car. (See sec. H, herein, and Resp. Exh. 3.) This final warning notice given to Barker was unlike any of the other warnings given by the Employer to Yaste or to Duane Hill insofar as implicating another employee falsely in Johnson's view. (See secs. I and J, herein.) I conclude that disparate treatment of Barker has not been shown.

I have given consideration to the uncontradicted testimony of employee Cain with regard to his conversation with Supervisor Howecraft. (See sec. H, herein.) I have given that conversation less weight because Howecraft was not the person who made the decision to terminate Barker, nor did the evidence reveal that Howecraft was privy to the reasons why Johnson terminated Barker. Cain's testimony revealed that Cain understood that Howecraft "was guessing, speculating." Note that Howecraft's response to Cain had been, "I think so, but I don't really know because he wasn't the one that fired him." Under those circumstances, I have given less weight to that conversation.

Finally, I have not overlooked the statements made by Johnson in January 1981 at the employees' meeting regarding what had happened at the San Francisco office and what might happen at Reno if the employees selected a union to represent them. (See sec. B, herein.) However, after considering all of the foregoing matters, I conclude that the Respondent has met the *prima facie* case presented by the General Counsel, and that the Respondent has established that the warnings given to Barker and the termination of Barker would have taken place, even in the absence of any union activities, and even in the absence of Barker's having given testimony at the representation hearing on April 9, 1981. Similarly, I conclude that a preponderance of the evidence, as analyzed above, does not establish that the employer has enforced its written warning system in a discriminatory manner after the commencement of union organizational activity. Accordingly, I must recommend to the Board that the General Counsel's complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue this recommended:

ORDER[1]

It is hereby recommended that the complaint in this proceeding be dismissed in its entirety.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.